LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 3 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 890

RALPH T. BRENGLE,
Petitioner and Appellant below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RALPH T. BRENGLE,
Pro Se.

Of Counsel:
MARK P. LOCKWOOD,
HERMAN L. McCRAY,
WILLIAM E. STATHAM,
Metropolitan Building,
Evansville, Indiana.

INDEX.

	PAGE
Opinions Delivered in the Court Below	1
Jurisdictional Statement	2
Questions Presented for Review	2
Constitutional Provisions, Treaties, Statutes, etc. Involved	3
Statement of the Case	4
Basis for Federal Jurisdiction	6
Reasons Relied on for the Allowance of the Writ	7
Appendix—Copy of Opinion Sought To Be Reviewed	13

List of Authorities.

Cases.

Asher v. Ruppa, 173 Fed. 2d 10	12
Beatty v. Gates, 4 Ind. 154	10
Dixon v. Duke, 85 Ind. 434	10
Indiana Federal Supply Co. v. Indianapolis, 41 Ind. App. 654, 84 N. E. 776	10
Mondamin etc., Dairy Co. v. Brudi, 163 Ind. 642, 72 N. E. 643	10
Patten v. Dennis, U. S. Atty., 134 Fed. 2d 137	11
Pierce v. Wagner, 34 Fed. 2d 958	11
Portland Body Works v. McCullough, etc. Co., 72 Ind. App. 216, 119 N. E. 180	10
Scott v. Brown, 90 Ind. App. 367, 157 N. E. 64	10
Taylor v. Altgelt, 224 Ind. 283, 67 N. E. 2d 531	10
Vulcan Iron etc., Co. v. Electric etc. Min. Co., 54 Ind. App. 28	10
65 Am. Law Reports, page 650	9
53 Am. Jur., trial, section 270, page 229	9
Wigmore on Evidence, section 2556, page 522	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

RALPH T. BRENGLE,
Petitioner and Appellant below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner would respectfully show to the Court:

OPINIONS DELIVERED IN THE COURT BELOW.

The District Court did not write an opinion. The opinion of the Court of Appeals is reported in 250 F. 2d 660, a copy of which is appended hereto and made a part hereof.

JURISDICTIONAL STATEMENT.

1. The judgment of the District Court was rendered on October 17, 1956, and entered on the record October 17, 1956, and said judgment was affirmed by the Court of Appeals, on December 20, 1957.

2. A petition for rehearing was denied by the Court of Appeals on January 27, 1958.

3. The statutory provision believed to sustain the jurisdiction of this court is section 1254 of Title 28 of the United States Code, which provides that:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: 1. By the writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *".

QUESTIONS PRESENTED FOR REVIEW.

The questions herein presented for review are:

a. Whether under rule 8a of the Federal Rules of Civil Procedure, providing that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, * * *" a complaint is subject to a motion to dismiss as to a person against whom no claim is alleged, or whether under such rule it is sufficient that the complaint merely allege a claim for relief, it not being necessary to link the parties named as defendants with the claim.

b. Whether the interpretation or construction of a written contract is a question of law for the court and not one of fact for the jury, or whether the Court of Appeals was correct in stating:

> "In order to determine the rights of the parties under the contract in suit, the clause therein as to payment of commissions had to be construed. * * *

The evidence of the plaintiff, which went to the jury without objection, and that introduced by the defendants themselves made the question of construction one for the jury. Accordingly, the District Court was correct in not construing the contract as a matter of law and submitting the construction of the contract to the jury."

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ETC. INVOLVED.

Rule 8a of the Rules of Civil Procedure for the District Courts of the United States, Section 2072, of Title 28 at page 4298, which provides as follows:

> "A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain * * *
>
> "2. A short and plain statement of the claim showing that the pleader is entitled to relief, * * *"

is involved in this cause.

STATEMENT OF THE CASE.

This action was brought in the United States District Court for the Southern District of Indiana by John E. Newman, respondent, against Potter and Brumfield Manufacturing Company, Inc., and Ralph T. Brengle, petitioner, to recover commissions claimed to be due under the terms of a written contract. The amended complaint was in three counts. Count 1 was based upon a written contract seeking commissions allegedly due. Count 2 was in quantum meruit, and Count 3 was for unjust enrichment. The defendant filed an answer consisting of five defenses, the first defense being that the complaint did not state a claim against defendant, Brengle, upon which relief could be granted. The second defense was that the defendant was an independent contractor. The third defense consisted of admissions and denials. The fourth was a plea of estoppel. The fifth defense was a plea of payment. Counts 1 and 2 were tried before a jury, and Count 3 before the Court. The jury found for the plaintiff and against the defendant, Ralph T. Brengle, in the sum of $25,140.27 on Count 1 and in favor of the other defendant, Potter and Brumfield Manufacturing Company, Inc., on said count. The court directed a verdict in favor of both defendants on Count 2, and sustained a motion for involuntary dismissal as to both defendants on Count 3.

One of the main questions presented to the trial court and the Court of Appeals as to Count 1 was whether the complaint was subject to a motion to dismiss in regard to defendant, Brengle, when the only allegation in the complaint which linked him with the contract sued upon was that he while acting solely as the agent for the defendant, Potter and Brumfield, entered into said contract with the plaintiff, Newman.

The other main question involved in Count 1 was the question of the construction of the following clause in the contract sued upon:

> "Until the effective date of cancellation hereof, *first party will pay second party a sales commission* as follows, on the net selling price *on all shipments made by Potter and Brumfield Manufacturing Company, Inc.*" (Italics ours.)

The defendant contended at the trial that under this contract, he was entitled to commissions on orders which were secured in his territory during his term of employment, irrespective of the time when the shipments of such orders were made. On the other hand, the defendant took the position that the language of the instrument providing "until the effective date of cancellation hereof, first party will pay second party a sales commission * * * on all shipments made by Potter and Brumfield, Inc." could not mean anything other than that the commissions were paid to plaintiff Newman on "all shipments made by Potter and Brumfield Manufacturing Company, Inc.," and such commissions terminated on the effective date of cancellation of the contract and therefore, the plaintiff, by the express terms of his agreement, was not entitled to any commissions whatsoever on any shipments made after such date. The construction of the contract was submitted to the jury and they returned a verdict for defendant, Potter and Brumfield, and against defendant, Brengle, in his individual capacity, in spite of the fact that it was alleged in the complaint that he was acting solely as an agent for defendant, Potter and Brumfield, when he entered into the contract with plaintiff, Newman. The defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. This motion was overruled. Timely appeal was taken to the Court of Appeals for the Seventh Circuit and the judgment of the lower court was

affirmed, the court holding that since there had been evidence introduced by both parties as to contracts and negotiations between the parties prior to the execution of the contract in suit along with the acts and conversations of the parties prior and subsequent thereto and simultaneous therewith the construction of the contract in suit was for the jury and that under Rule 8a of the Federal Rules of Civil Procedure, the complaint stated a valid cause of action for which relief could be granted as against the defendant, Brengle. Motion for re-hearing was timely filed and denied by the court.

BASIS FOR FEDERAL JURISDICTION.

Review of the judgment of the United States District Court for the Southern District of Indiana, Evansville Division, and of the decision of the United States Court of Appeals for the Seventh Circuit being sought, Federal jurisdiction in the court of the first instance is based upon the following allegations in plaintiff's complaint, found in the appendix of the defendant-appellant at page 6, reads as follows:

> "1. That plaintiff, John E. Newman, d/b/a Newman-Krause Company, is a citizen of the State of Illinois, and the defendant, Ralph T. Brengle, is a citizen of the State of Indiana, the defendant, Potter and Brumfield Manufacturing Company, Inc., is a corporation incorporated under the laws of the State of Indiana, and for convenience, is hereinafter called Potter and Brumfield."

The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decisio . of the Court of Appeals that the District Court was correct in not construing the contract as a matter of law, and that the construction of the contract was a question of fact to be submitted to the jury is a decision on an important question of Indiana law, which is in conflict with applicable Indiana decisions.

The opinion of the Court of Appeals on the question of construction of the contract in suit is based upon the theory that the duty to construe a written contract terminates if evidence is introduced of contracts and negotiations between the parties prior to the execution of the contract, and the construction of the contract thereupon becomes a function of the jury. The portion of the decision in which the Court makes their holding on this point reads as follows:

> "In order to determine the rights of the parties under the contract in suit the clause therein as to payment to commissions had to be construed, the defendant-appellant contended that the clause was unambiguous and should have been construed by the court as a matter of law. However, the defendant without objection, permitted the plaintiff to introduce in evidence contracts and negotiations between the parties prior to the execution of the contract in suit along with the acts and conversations of the parties prior and subsequent thereof as simultaneous therewith. The defendants also offered the same kind of evidence in an attempt to prove their interpretation placed upon the contract in suit was ambiguous or unambiguous because the evidence of the plaintiff, which went to the jury without objection, and that introduced by the defendants themselves made the question of construc-

tion one for the jury. Accordingly, the District Court was correct in not construing the contract as a matter of law and in the submission of the cause to the jury."

The petition respectfully submits that this rule is in conflict with the law of Indiana. The firmly settled rule applicable not only in Indiana but also well established throughout the various jurisdictions, is that:

"Construction of Documents. The construction of all written instruments belongs to the Court. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as of any local or commercial meanings attached to particular words by usage; and the ascertainment of this is for the jury. But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court." Wigmore on Evidence, §2556, p. 522.

"The rule laid down in cases which consciously regard the lines that separate the function of the court from that of the jury is substantially that the construction of the contract is always a matter of law for the court no matter how ambiguous or uncertain or difficult its terms, and the jury can only assist in determining disputed questions of fact; that if the circumstances to be considered in the interpretation of the contract are in dispute and the meaning of the contract depends thereon, the determining of the disputed facts must be left to the jury, but the proper construction of the contract cannot be left to them." 53 Am. Jur. "Trial", §270, p. 229.

"If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury, and the court must direct a verdict in accordance with the construction placed on the contract by the court, in the light of the admitted circumstances. On the other hand, if such circumstances are in dispute, and the meaning of the contract is to be determined one way, according to one view of the facts, and another way, in accordance with

the other view of the facts, then the determination of the disputed fact must be left to the jury; *but in no case can the proper construction of the contract be left to a jury.*" * * * (Italics ours.) 65 American Law Reports, page 650.

The following Indiana decisions hold that the construction of a contract is a question of law for the court, and the jury's only function is to determine disputed questions of fact:

"It may be properly left to a jury to determine the facts, but, the facts having been determined, the interpretation of the contract remains the exclusive province of the court." *Portland Body Works* v. *McCullough, etc. Co.*, 72 Ind. App. 216.

"The construction of a written contract is for the court, and the jury have no authority to take upon themselves the work of giving the instrument a construction." *Dixon* v. *Duke*, 1882, 85 Ind. 434.

"The construction of a contract is for the court, and not for the jury." *Indiana Fed. Supply Co.* v. *Indianapolis*, 1908, 41 Ind. App. 654, 84 N. E. 776.

"It is the exclusive province of the court to interpret or construe the provisions of a written contract involved in any action." *Mondamin, etc., Dairy Co.* v. *Brudi*, 1904, 163 Ind. 642.

See also: *Vulcan Iron, etc. Co.* v. *Electric, etc. Min. Co.*, 54 Ind. App. 28; *Beatty* v. *Gates*, 1853, 4 Ind. 154; *Scott* v. *Brown*, 1927, 90 Ind. App. 367, 157 N. E. 64; *Taylor* v. *Altgelt*, 224 Ind. 283, 67 N. E. 2d 531.

The contract in suit clearly provided that commissions were to be paid to the plaintiff, Newman, on shipments made by Potter and Brumfield into the plaintiff's territory until the date of cancellation of the contract. This provision of the contract cannot possibly be reasonably construed to mean anything other than that the shipment must

be made before the date the contract is cancelled in order for said shipment to entitle the plaintiff to a commission thereon. Nevertheless, although a motion for a directed verdict was filed at the close of the plaintiff's evidence, and renewed at the close of *all the evidence*, the court submitted the construction of the contract to the jury and they construed the provision of the contract differently, and the court overruled the defendant's motion for judgment notwithstanding the verdict. The Petitioner respectfully submits that the court was in error in submitting the construction of the contract to the jury, and the construction of the contract by the jury was completely illogical, and therefore the court was in error once more by denying the petitioner's motion for a judgment notwithstanding the verdict.

2. The decision of the said Court of Appeals, as to whether the complaint stated a sufficient claim for relief involves an important question of Federal law, which should be settled by the court, the decision being in conflict with the decisions of the Court of Appeals of the Ninth Circuit, on the same matter, in the case of *Patten* v. *Dennis*, U. S. Attorney, 134 F. 2d 137, and the case of *Pierce* v. *Wagner*, 34 F. 2d 958. These cases hold that a claim showing a right to relief, is not stated sufficiently unless the statement of claim for relief links the parties before the court with the legal wrong so as to entitle the plaintiff to judicial redress against the defendant. In the case brought before this court by this petition, the only allegation of the complaint attempting to connect the defendant, Brengle with the cause of action is that "defendant Brengle, as the exclusive sales manager for Potter and Brumfield, entered into a written contract with plaintiff." In other words, the complaint charges that Brengle, while acting on behalf of Potter and Brumfield as their agent, entered into the contract with

plaintiff, Newman. It is an elementary general rule of law that is well established throughout the country that an agent is not personally liable for the contracts he enters into on behalf of his principal. The Court of Appeals in upholding the ruling of the District Court, denied the petitioner's motion to dismiss the complaint, cited the case of *Asher* v. *Ruppa*, 7th Circuit, 173 Fed. 2d 10. The *Asher* case states:

> "If, in view of what is alleged it reasonably can be conceived that plaintiff can upon the trial make a case which would entitle him to some relief, the complaint should not be dismissed."

The petitioner is not attempting here to refute this statement of law, but maintains that the language of the *Asher* case is not sufficiently broad to permit a plaintiff to allege his case so indefinitely as to omit making his claim out against the person from whom relief is sought. Thus, the petitioner respectfully submits that said Court of Appeals has incorrectly broadened the meaning of Rule 8a of the Civil Procedure in regard to what the plaintiff must allege before he has stated a valid claim for relief, and the holding of the said Court of Appeals is in conflict with the decisions of the other circuits.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Seventh Circuit commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a certified transcript of the record and proceedings herein; and that the decree of the United States District Court for the Southern District of Indiana, Evansville Division, be re-

versed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

RALPH T. BRENGLE,
Pro Se.

Of Counsel:

MARK P. LOCKWOOD,
HERMAN L. McCRAY,
WILLIAM E. STATHAM,
Metropolitan Building,
Evansville, Indiana.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11993. September Term, 1957. September Session, 1957

JOHN E. NEWMAN, d/b/a NEWMAN KRAUSE COMPANY,
Plaintiff-Appellee,
vs.
RALPH T. BRENGLE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

December 20, 1957.

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This is an appeal from a judgment on a jury verdict for the plaintiff and against the defendant Ralph T. Brengle in the sum of $25,140.27 on Count One of an amended complaint, and in favor of the other defendant Potter & Brumfield Manufacturing Company, Inc.

The amended complaint was in three counts. Count One declared upon a written contract seeking commissions, allegedly due, Count Two in *quantum meruit* and Count Three for unjust enrichment.

The issues joined by Counts One and Two and the answers of the defendants thereto were submitted to the jury. At the conclusion of the plaintiff's case the defend-

ants moved for a directed verdict. The District Court denied the motion as to Count One and granted the motion as to Count Two. The trial proceeded on Count One with the jury returning the verdict on which judgment was entered.

While the jury was deliberating, Count Three was tried to the Court terminating in an involuntary dismissal at the conclusion of all of the evidence. There is no cross-appeal and, therefore, there is no question raised by the plaintiff on the action of the District Court in directing a verdict for the defendants on Count Two or in dismissing Count Three.

The defendant-appellant asserts in his brief that the errors relied upon arise out of the ruling of the court as to his first defense; the failure of the court to require plaintiff to elect as to the theory upon which he intended to proceed; failure to grant motion for directed verdict on Count One of the amended complaint; failure of the court to construe the contract as a matter of law; rulings on the evidence; instructions; submission of the cause to a jury; denying motion for judgment n. o. v. and denying motion for new trial.

There is no question but that Count One of the amended complaint stated a claim upon which relief could be granted as to the defendant-appellant. *Asher* v. *Ruppa*, 7 Cir., 1949, 173 F. 2d 10. The District Court was correct in denying the first defense which was a motion to dismiss for failure to state a claim "upon which relief can be granted."

There is no merit to the contention that the District Court committed error in failing to require the plaintiff to elect as to the theory upon which he intended to proceed. The defendants, *sua sponte*, withdrew their motion after the District Court directed a verdict for them on Count

Two and thereby waived error, if any, of which complaint is now attempted to be made.

At the conclusion of the plaintiff's case, the defendants' motion for a directed verdict was denied as to Count One of the amended complaint and they thereupon introduced evidence on their behalf in defense. Error, if any, in the denial of the motion was thereby waived, and the motion was not well taken when made at the conclusion of all the evidence because of the evidence introduced by the defendants and particularly under the second defense of the defendant-appellant. *Auto Transport, Inc.* v. *Porter*, 8 Cir., 1952, 197 F. 2d 907, 908-909.

The defendant-appellant filed an answer consisting of five defenses. The second defense alleged that at all times mentioned in plaintiff's amended complaint and with reference to all matters alleged therein he "was, and acted in the capacity of, an independent contractor." He introduced evidence in proof of that defense. Accordingly when the defendants renewed their motion for a directed verdict at the close of all the evidence the question as to whether the defendant-appellant was acting as an independent contractor or as the agent of the defendant Potter & Brumfield Manufacturing Company, Inc. was one for the determination of the jury. The contract in suit was signed by the defendant-appellant without designation and the contract, as to the capacity in which he was acting at the time of its execution, was ambiguous and indefinite.

In order to determine the rights of the parties under the contract in suit the clause therein as to payment of commissions had to be construed. The defendant-appellant contended that the clause was unambiguous and should have been construed by the Court as a matter of law. However, the defendants without objection permitted the plaintiff to introduce in evidence contracts and negotiations between the parties prior to the execution of the contract

in suit along with the acts and conversations of the parties prior and subsequent thereto and simultaneous therewith. The defendants also offered the same kind of evidence in an attempt to prove their interpretation placed upon the contract. Therefore, we are not called upon to decide whether the contract in suit was ambiguous or unambiguous because the evidence of the plaintiff, which went to the jury without objection, and that introduced by the defendants themselves made the question of construction one for the jury. Accordingly, the District Court was correct in not construing the contract as a matter of law and in the submission of the cause to the jury.

In a careful review of the record in this case we cannot say that the District Court committed reversible error in any of its rulings on the evidence.

The Court gave instructions No. 15 and No. 16 concerning the construction of ambiguity and uncertainty in contracts, to neither of which the defendants objected. The defendants did object to the Court's instruction No. 13 and tendered to the Court instructions which informed the jury that they should determine from the actions of the parties the meaning they placed on the contract and thus decide its proper construction. The Court's instruction No. 13 given and objected to and the defendants' two instructions that were refused state that the harshness or inequity of a specific interpretation shall or shall not be considered according to the interpretation placed upon the contract by the parties themselves and that such interpretation will be determinative. The parties emphasize opposite sides of the problem, as might be expected, but the rationale is the same. Since the instructions requested by the defendants do nothing more than elaborate on the Court's instruction No. 13 we believe there is no merit to the defendants' objection to the instructions given or refused on these grounds.

The defendant-appellant also objects to the giving of the Court's instructions No. 7, 12 and 25 dealing with the law on breach of contract as to the burden of proof and the measure of damages. Error, if any, in the giving of these instructions would be harmless for the simple reason that any damages occasioned by defendants' breach of the contract and the amount of any commissions owing to the plaintiff under the contract would be identical.

Upon the record as it comes to us we believe the construction of the contract in suit was for the jury and the jury having decided that question on a record containing sufficient evidence to support its verdict and free from prejudicial error we cannot disturb it.

The judgment is

AFFIRMED.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 21 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 390

RALPH T. BRENGLE,
Petitioner and Appellant Below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PAUL H. SCHMIDT,
703 Old Nat'l Bank Bldg.,
Evansville 8, Indiana,

BENJAMIN E. BUENTE
of
BUENTE & BUENTE,
419 Court Building,
Evansville 8, Indiana,
Attorneys for Respondent, John E. Newman d/b/a Newman-Krause Company.

BENJAMIN E. BUENTE, JR.,
419 Court Building,
Evansville 8, Indiana,
Of Counsel.

INDEX.

	PAGE
Questions Presented for Review	1
Statement of the Case	4
Reasons for Refusing the Writ	10
Argument	11
Conclusion	16

List of Authorities Cited.

Asher v. Ruppa (7th Cir.) 173 F. 2d 10, at page 12	15
Atkinson v. New Britain Machine Co. (7th Cir. 1946) 154 F. 2d 895, p. 901	14
Bayer v. Oxford University Press, Inc. (1946) 61 N. Y. Supp. 2d 209	14
Estes v. Anderson Oil Co. (1931) 93 Ind. App. 365, 176 NE 560, at page 562	11
Groome v. Freyn Engineering Co. (1940) 374 Ill. 113, 28 N. E. 2d 274 (15) at p. 282	14
Michigan Chemical Corpn. v. G. W. Frady, et al. (1955) 289 Pac. 2d 363	14
Ohio Marble Co. v. Byrd (6th Cir. 1933) 65 F. 2d 98	14
Patten v. Dennis, U. S. Attorney, 134 F. 2d 137	14
Pierce v. Wagner, 34 F. 2d, 958	14
Reissner, et al. v. Oxley, et al. (1881) 80 Ind. Supreme Court 580, at page 584	12
Singer Mfg. Co. v. Brewer (1906) 93 S. W. 755	14
Van Praag v. F. R. Corporation (1947) 73 N. Y. Supp. 2d 82	14

Vulcan Iron Works Co. v. Electric Magnetic Gold Mining Company (1913) 54 Ind. App. 28; 99 N. E. 429, at page 432 12

53 Am. Jur. "Trial", Section 270, pp. 228 and 230 11

Abbreviations.

Deft.-Aplnt. Brengle Apx.....
.....Appendix for defendant-appellant (Brengle)

Ptf.-Aple. Newman Apx.....
.....Appendix for plaintiff-appellee (Newman)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 890.

RALPH T. BRENGLE,
Petitioner and Appellant Below,

vs.

JOHN E. NEWMAN, D/B/A NEWMAN KRAUSE COMPANY,
Respondent and Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW.

---

a. No question was presented to USCA, 7th Circuit, on "motion to dismiss". Petitioner Brengle in his brief to the Court of Appeals, page 10, under "Contested Issues" presented:

"5. The Court erred in overruling appellant's first

defense that Count One (1) of amended complaint fails to state a claim against the defendant, Brengle, upon which relief can be granted."

Petitioner Brengle sets forth a false premise in an effort to sustain his contention that the amended complaint does not state a claim against him, and attempts to leave an inference that he is not linked with the claim. To readily recognize petitioner's error, attention is respectfully invited to the amended complaint, Count One, beginning on page 6 of Deft.-Aplnt. Brengle Apx., and the contract signed by petitioner Brengle, beginning on page 11 of Deft.-Aplnt. Brengle Apx., which was made a part of the amended complaint as "Exhibit A". The contract was prepared by Brengle. Ptf.-Aple. Newman Apx., p. 98, Q. 185.

Count One of the amended complaint (Deft.-Aplnt. Brengle Apx., p. 6) was against both defendants, Brengle and Potter & Brumfield. "The plaintiff complains of the defendants and avers:" Both defendants are included in averments in rhetorical or literary paragraphs 1, 2, 3, 4, and 5. The demand for judgment was against both defendants. The contract (Deft.-Aplnt. Brengle Apx., p. 11), which formed the basis of the suit was *signed by R. T. Brengle, without designation*, and a copy was made a part of the amended complaint as "Exhibit A". The answer of defendant-petitioner Brengle begins on page 14 of Deft.-Aplnt. Brengle Apx. In his second defense, Brengle says he acted in the capacity of an independent contractor. In his third defense, par. 2, *Brengle admits the allegations contained in rhetorical paragraph 2 of Count One of plaintiff's amended complaint*, that "plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield within the designated territory * * *."

In the 5th paragraph of his third defense, Brengle admits the allegations of plaintiff Newman's rhetorical paragraph

6 of Count One "That plaintiff has performed all the terms and conditions of said contract by him to be performed.' Brengle in his fifth defense says he paid to Newman all moneys due.

b. Petitioner projects a "loaded" proposition. Generally the construction of a written contract is a question of law for the Court. The question here, however, is whether or not in the case of ambiguity in a written contract, where the parties, by their acts and conduct, have placed a construction thereon, and parol evidence having been introduced by both parties, without objection, explaining the ambiguity and showing such construction, the meaning of the contract, in the light of such parol evidence, in this case, became a question of fact to be determined by the jury.

STATEMENT OF THE CASE.

Respondent takes exception to petitioner's statement of the case in the following particulars:

(a) Again respondent insists that no question was presented to the USCA, 7th Circuit, concerning petitioner Brengle's "motion to dismiss". The question presented was whether or not the Court erred in overruling appellant's first defense that Count One of amended complaint failed to state a claim against defendant Brengle, upon which relief could be granted. (Brief and Argument for defendant-appellant Brengle, page 10, paragraph 5.)

Count One of the amended complaint (Deft.-Aplnt. Brengle Apx., p. 6) was against both defendants, Brengle and Potter & Brumfield. "The plaintiff complains of the defendants and avers:" Both defendants are included in averments in rhetorical or literary paragraphs 1, 2, 3, 4, and 5. The demand for judgment was against both defendants. The contract (Deft.-Aplnt. Brengle Apx., p. 11), which formed the basis of the suit was *signed by R. T. Brengle, without designation*, and a copy was made a part of the amended complaint as "Exhibit A". The answer of defendant-petitioner Brengle begins on page 14 of Deft.-Aplnt. Brengle Apx. In his second defense, Brengle says he acted in the capacity of an independent contractor. In his third defense, par. 2, *Brengle admits the allegations contained in rhetorical paragraph 2 of Count One of plaintiff's amended complaint*, that "plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield within the designated territory * * *."

In the 5th paragraph of his third defense, Brengle admits

the allegations of plaintiff Newman's rhetorical paragraph 6 of Count One "That plaintiff has performed all the terms and conditions of said contract by him to be performed." Brengle in his fifth defense says he paid to Newman all moneys due.

Nowhere in plaintiff's amended complaint is it alleged that Brengle was acting solely as an agent for defendant Potter & Brumfield, as stated in the petition for writ of certiorari. The amended complaint, first count, rhetorical paragraph 2, does aver among other things "that plaintiff (Newman) was to be the exclusive sales representative of *products sold by defendant Brengle* and manufactured and shipped by Potter & Brumfield, within the designated territory * * *."

(b) The contract does provide as petitioner states that "until the effective date of cancellation hereof, first party will pay second party a sales commission * * *", but petitioner omits the following ambiguous parts of the contract:

> "*against orders invoiced to customers in the territory above described*, except in cases where a different rate of commission is agreed upon by both parties, such payments to be made on or about the 10th day of each month covering shipments made during the preceding calendar month."
>
> "10% commission on all shipments to jobbers or distributors on which is allowed a maximum discount of 33⅓%. *Commissions on sales* to Industrial or Manufacturing accounts will be *7% of net billings.*" (Deft.-Aplnt. Brengle Apx. p. 12.)

There never was a cancellation of the contract in accordance with its terms. It provided:

> "This appointment may be cancelled by either party on thirty (30) days' notice, but shall extend from January 1, 1951, until so cancelled." (Deft.-Aplnt. Brengle Apx., p. 12.)

Actually, defendant-petitioner Brengle gave one day's notice to cancel, as shown by plaintiff's Exhibit 9-A, dated July 31, 1952, and reads in part:

> "In accordance with the terms of our contract, this cancellation becomes effective 1 August, 1952 * * *",

and signed by R. T. Brengle. (Deft.-Aplnt. Brengle Apx., p. 124; offered in evidence Ptf.-Aple. Newman Apx., p. 35.)

The intention of the parties under the ambiguous contract to the effect that there should be no forfeiture of commissions on orders procured from plaintiff's territory and on hand at the factory on the date of attempted termination, regardless of dates when shipments were made, was recognized by defendant-petitioner Brengle, and respondent Newman cites several instances. An oral agreement was entered into between the parties as an inducement from Brengle to Newman to enter into their first written contract (not in suit), whereby plaintiff Newman was to receive relatively small commissions on house accounts then on hand and the commissions were paid irrespective of when shipments were made. (Deft.-Aplnt. Brengle Apx., p. 44, Q. 346-354; p. 46, Q. 361; p. 47, Q. 364, 365; p. 77, Q. 53; p. 80, Q. 68. Ptf.-Aple. Newman Apx., pp. 129-130, Q. 14-17.)

This intention was again recognized when defendant-petitioner Brengle terminated the first written contract (not in suit), dated October 18, 1949, on one year's notice, which termination date was effective December 31, 1950, and commissions were paid on all orders on hand on December 31, 1950, regardless of the dates when shipments were made. (Deft.-Aplnt. Brengle Apx., p. 32, Q. 292, to p. 34, Q. 303.)

Defendant-petitioner Brengle admitted that the contract provided for commissions on sales, and we quote his testimony from Ptf.-Aple. Newman Apx. p. 98:

"Q. 187. Now, I call your attention to what the contract says. See that language there, commissions on sales to industrial and manufacturing accounts will be seven percent of net billing. Now, the contract provided for commission on sales, did it not?"

"A. That so states, yes."

The obligation of defendant-petitioner Brengle that he is the real party to pay the commissions is acknowledged in his communication, found in Ptf.-Aple. Newman Apx., p. 121, and offered in evidence on the same page, a part of which reads:

"The only change is that hereafter Ralph Brengle, as an individual, is responsible for payment of your commissions.

"This obligation is herewith acknowledged * * *."

Defendant-appellant Brengle further testified in chief (Deft.-Aplnt. Brengle Apx., p. 80):

"Q. 68. Was there any discussion, any further discussion in those conversations?"

"A. Yes. The general details of the proposed contract were discussed and agreed upon verbally. One of the factors was that he would be paid commission on all shipments made by the factory in Princeton, Indiana into the so-called number five territory, on and after the effective date of his contract, regardless of when those orders were received by the factory * * *."

Defendant-petitioner Brengle used the words "*all shipments,*" and it was not limited to a part of the shipments or shipments made during any particular period, but on all shipments.

To illustrate further the ambiguity, respondent calls attention to two additional instances: the language of the first paragraph of the contract, as drafted by defendant-petitioner Brengle, reads:

"Ralph T. Brengle, hereinafter called the 'first

party', being the General Sales Manager for products manufactured by Potter & Brumfield Mfg. Co., Inc., an Indiana Corporation * * *."

Obviously, products, being inanimate objects, can have no General Sales Manager.

Reference is made to the testimony of Howard Hightower, Secretary of Potter & Brumfield Mfg. Co. (Ptf.-Apl. Newman Apx. p. 122)

"Q. 20. Now, what was the position of Mr. Brengle?"

"A. Mr. Brengle, as I understand it, was Vice President of Potter & Brumfield Manufacturing Company and was the sole sales agent as general manager for Potter & Brumfield Manufacturing Company."

"Q. 21. He was pretty much the chief cook and bottle washer?"

"A. From the sales end, he was the chief cook and bottle washer."

Defendant-petitioner Brengle received his 15% commission on all sales, but has refused to pay respondent Newman his 7% commission. Richard M. Brumfield, President of Potter & Brumfield, testified:
(Ptf.-Aple. Newman Apx. p. 116)

"Q. 32. That was your understanding. Now, calling your attention to page three, paragraph four, where it provides for 15% commission, has either the Brengle Sales or Ralph T. Brengle been paid that 15% commission?"

"A. Yes."

(Ptf.-Aple. Newman Apx. p. 118)

"Q. 46. Now, under this second contract, Exhibit *ZZZ*, paragraph three, was the Defendant Brengle also to be paid 15% ?"

"A. Yes, sir."

"Q. 47. On the *sales?*"

"A. Yes, sir."

"Q. 49. Now, this commission of 15% that is referred to in these two contracts, that covers the period of time that the Plaintiff is claiming commission for orders that were sent in from his territory, does it not?"

"A. That is correct."

"Q. 50. Now has the Defendant Brengle been paid the 15% on those orders that the Plaintiff Newman—that came in from the Plaintiff Newman's territory?"

"A. I would assume so."

"Q. 51. On all of them?"

"A. I would assume so."

"Q. 52. Do you know whether Newman has been paid?"

"A. No, I do not."

"Q. 53. You do not. So, as far as you know, the 15% commissions that were paid, they stopped with Brengle?"

"A. As far as Potter & Brumfield are concerned, yes."

As one of numerous instances showing that much time was used by defendant-petitioner Brengle to explain his understanding of the ambiguous contract and the actions and interpretation of the parties, he introduced some 66 exhibits. (A to Z; AA to ZZ; AAA to XXX, which may be found in the Exhibits part of the Record.)

The trial Court sustained motion to amend complaint to conform to the evidence, by changing demand from $29,191.34 to $49,178.10. (Ptf.-Aple. Newman Apx., p. 132.) And the verdict of the jury was for $25,140.57. (Dft.-Aplnt. Brengle Apx. p. 153.)

REASONS FOR REFUSING THE WRIT.

1. The decision of the Court of Appeals does not conflict with any decisions of that Court, or any other Court of Appeals, or the Courts of Appeal of Indiana, or this Court.

2. The petitioner fails to point out any error or defect in the proceedings in the trial Court inconsistent with substantial justice.

ARGUMENT.

1. The decision of the Court of Appeals that in this case involving ambiguities in the contract, and where both parties introduced evidence without objection as to the actions, interpretation and construction they placed on the contract, it was proper to submit the question to the jury, and it is not in conflict with applicable Indiana decisions.

In substantiating his viewpoint, petitioner cites 53 Am. Jur. "Trial", paragraph 270, page 229. We quote the following from the same book and paragraph, page 228:

> "WHERE EXTRINSIC EVIDENCE IS INTRODUCED. It is quite uniformly recognized that where a written contract is ambiguous and extrinsic evidence as to intention has been introduced, there exists within the province of the jury some function as to the construction of the contract. Some courts state the rule to be that where a written contract is ambiguous, and extrinsic evidence as to intention has been introduced, the determination of the meaning of the contract becomes a question of fact for the jury in the light of the extrinsic evidence."

and also at page 230:

> "But where the contract is not clear or is ambiguous, and, even though the evidence is not conflicting, and different reasonable conclusions are possible, the question is one for the jury."

Most of the Indiana decisions cited by petitioner do not deal with ambiguous contracts, and this case comes under the exception which is as well founded as the rule itself, and is the law in Indiana, as cited in *Estes* v. *Anderson*

Oil Co. (1931), 93 Ind. App. 365; 176 N. E. 560, at page 562, where the Court said:

> "In case of ambiguity in a written contract, or in case of construction thereof by the parties themselves, disclosed by their actions and conduct in connection therewith, parol proof may be offered explaining the ambiguity, and also establishing such construction, and in such event the question of the meaning of the contract in the light of such parol evidence becomes a question of fact to be determined by a jury."

In *Vulcan Iron Works Co.* v. *Electric Magnetic Gold Mining Company* (1913), 54 Ind. App. 28; 99 N. E. 429, the question of ambiguity was submitted to the jury, who returned a verdict for plaintiff from which an appeal was taken and judgment was affirmed; and the following is quoted from the Court's opinion: 99 N. E. at top of page 432:

> "If the jury properly understood the meaning of the contract, it is not material whether that meaning was adopted from the court, or derived by the jury from a consideration of the contract. The result is the same in either case."

In another leading Indiana case, *Reissner, et al.* v. *Oxley, et al.* (1881), 80 Ind. Supreme Court 580, the Court on page 584 said:

> "While there has been, and is perhaps yet, a difference of opinion among the members of this court, in reference to the interpretation of this contract, if construed without looking beyond its terms, we are agreed that it was proper to leave it to the jury to determine, *under the evidence which was admitted without objection, and, indeed, was adduced by both sides, what construction the parties themselves had placed upon it;* and that, for the purpose of submitting this question to the jury, the instruction which was given is not justly subject to the objections urged against it.

"The right of parties to put an interpretation upon their own contracts, event to the extent of doing away, practically, with the ordinary and plain meaning of terms, can not well be denied, so long as their interpretation does not result in a contract which for some reason is in itself unlawful. And the cases are numerous and consistent, which permit a resort to proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, *when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and, when this is done, the question must be left to the decision of the jury substantially as was done in this instance.*" (Our italics.)

As pointed out in respondent's statement of the case, the contract is ambiguous; both parties introduced evidence without objection as to the interpretation and construction placed on the contract; the petitioner Brengle admitted that the contract provided for a commission on sales; that he prepared the contract; that he individually was responsible for payment of the commissions under the contract; and that he gave the purported ineffective notice of cancellation, which provided for one day's notice instead of thirty days, as required by the contract. The evidence further shows as set forth in respondent's statement of the case that petitioner Brengle received his 15% on all the business produced by respondent Newman, but has refused to pay Newman his 7%. The Court permitted an amendment, increasing the demand from $29,191.34 to $48,178.10, to conform to the evidence, and the jury returned its verdict for $25,140.57.

Plaintiff-respondent's obligation was discharged when orders were forwarded to defendant-petitioner, and his commissions had then been earned; and it was not material

that the commissions did not become due until after the purported termination of his contract.

Ohio Marble Co. v. *Byrd* (6th Cir. 1933), 65 F. (2d) 98.

Singer Mfg. Co v. *Brewer* (1906), 93 S. W. 755.

Michigan Chemical Corpn. v. *G. W. Frady, et al.*, (1955), 289 Pac. (2d) 363.

Van Praag v. *F. R. Corporation* (1947), 7.. N. Y. Supp. (2d) 82.

Bayer v. *Oxford University Press, Inc.* (1946) 61 N. Y. Supp. (2d) 209.

Unless an agreement clearly provides to the contrary, a person selling on a commission basis is entitled to commission when a sale is made, irrespective of when shipment takes place.

Atkinson v. *New Britain Machine Co.* (7th Cir. 1946), 154 F. (2d) 895, p. 901.

Groome v. *Freyn Engineering Co.* (1940), 374 Ill. 113, 28 N. E. (2d) 274 (15) at p. 282.

2. Petitioner says the decision of the Court of Appeals as to whether the complaint stated a sufficient claim for relief, involves an important question of Federal law, and that the decision is in conflict with the decisions of the Court of Appeals of the Ninth Circuit, and cites two cases. Surely, petitioner Brengle cannot be serious in comparing respondent's amended complaint with the garbled "pleadings" in the case of *Patten* v. *Dennis*, U. S. Attorney, 134 F. 2d 137, in which Patton acted as his own attorney; and as to the case of *Pierce* v. *Wagner*, 34 F. 2d 958, respondent has been unable to find this case as cited.

In view of the record of this case as set forth briefly in respondent's statement of the case, it is sheer folly for petitioner to assert that he is not sufficiently linked with

the claim to entitle plaintiff to redress. The contract in question was incorporated as an exhibit in the amended complaint, and it is elementary that if there is any difference between the exhibit and the pleading, that the exhibit controls.

The amended complaint stated a cause of action against defendant-petitioner Brengle, with all the certainty that the ambiguous contract prepared by him reasonably permitted.

The Court said in *Asher* v. *Ruppa*, 7th Cir., 173 F. 2d, 10, at page 12:

> "Plaintiffs are not required to plead all their evidence, and under the rules of civil procedure, there is no pleading requirement of stating facts sufficient to constitute a cause of action; indeed, the only requirement is that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Federal Rules of Civil Procedures, rule 8 (a), 28 USCA. The law is now settled that upon motions to dismiss a complaint on the ground that it does not state a claim upon which relief can be granted, the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true."

Conclusion.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

PAUL H. SCHMIDT,
703 Old Nat'l Bank Bldg.,
Evansville 8, Indiana,

BENJAMIN E. BUENTE
of
BUENTE & BUENTE,
419 Court Building,
Evansville 8, Indiana,
Attorneys for Respondent,
John E. Newman d/b/a
Newman-Kraus Company.

BENJAMIN E. BUENTE, JR.,
419 Court Building,
Evansville 8, Indiana,
Of Counsel.